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No. 84-1259

IN THE

Supreme Court of the United States

October Term, 1985

THE DOW CHEMICAL COMPANY,

Petitioner,

versus

UNITED STATES OF AMERICA,
BY AND THROUGH ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JANE M. GOOTEE, Esq.
Counsel of Record

JAMES H. HANES, Esq.
BERND W. SANDT, Esq.
THE DOW CHEMICAL COMPANY
1111 Washington Street
Midland, Michigan 48674
(517) 636-2663

Counsel for Petitioner

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

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Dow believes that EPA's surreptitious acquisition of detailed aerial reconnaissance photographs of Dow's entire manufacturing facility for use as evidence in enforcement litigation (A. 31-32) is both contrary to Section 114 of the Clean Air Act (42 U.S.C. § 7414) and an unreasonable search in violation of the Fourth Amendment. EPA completely bypassed the Judiciary and engaged in its intrusive quest for evidence — despite both Dow's explicit refusal of consent for a repetitive on-site inspection with a camera (A. 29), and a Dow/EPA discussion about the need for a search warrant (Pribila Affidavit, Exh. A, Dist. Ct. Dkt. 120).

The government does not find fault with the holding of the Court of Appeals that Dow has a reasonable

expectation of privacy from ground level intrusion (Pet. App. A-8). The government does not argue that the Dow facility is an open field from an aerial perspective. The government does not assert that the Dow facility is anything other than a secured, developed commercial structure. The government *admits* "that aerial photography allows more to be seen than mere observation from the air by the unaided human eye" (Gov't. Brief, p. 21). However, the government argues the case on hypothetical facts — that is mere outdoor activity and mere observation, and then erroneously concludes that the principles applicable to mere observation of visible property also control intrusive aerial photography (Gov't. Brief, p. 7). Aerial observation with the naked eye is not at issue.

When applied to the facts of this suit, the cases and authorities cited by the government are either not applicable or they support Dow.

ARGUMENT

I.

EPA UNREASONABLY INTRUDED INTO THE DETAILS OF DOW'S SECURED, DEVELOPED INDUSTRIAL FACILITY — EPA DID *NOT* MERELY OBSERVE OUTDOOR ACTIVITY.

The government incorrectly and persistently mischaracterizes the case by utilizing such terms as "outdoor activity" or "outdoor plant" (over 40 references) and "observation" or "viewing" (over 90 times). Those terms are surely intended to prompt the Court to think of the Dow property as an open field rather than the secured, developed industrial facility that it is. The characterization of EPA's sortie as a mere observation or viewing ignores both the fact that the aerial photography cap-

tured vivid detail beyond the perception of the human eye or mind (Pet. App. B-27; Gov't Brief, p. 21), and the fact that no EPA personnel were even in the plane to observe or view the Dow facility.

Oliver v. *United States*, 80 L.Ed.2d 214, 224-225, and n. 8, 10, 11 (1984)[1] confirms that secured commercial structures such as the Dow property are enclaves that should be free from arbitrary government interference while open and undeveloped "open fields" are not so protected.

Before discussing what arguments the government made and what arguments are conspicuous by their absence, the case should be put into perspective.

The Sixth Circuit Court of Appeals *agreed* with the District Court that Dow has a reasonable expectation of privacy from *ground* level intrusions (Pet. App. A-8). The Court of Appeals then created an internal inconsistency in its own opinion and reversed the District Court's summary judgment ruling on the basis that from an *aerial perspective*, the Dow facility is "like open fields" (Pet. App. A-9). But for the open fields analogy, the Court of Appeals would have found that EPA's actions constituted a search, that *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978) controls, and that Dow's Fourth Amendment rights were violated (Pet. App. A-5). The Court of Appeals is clearly in error in holding that Dow's Midland facility is an open field from the air.

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[1] Contrary to the statement on page 4 of the government's brief, the District Court made its ruling not only on the basis of the panel decision in *United States* v. *Oliver*, 657 F.2d 85 (6th Cir. 1981), but confirmed the correctness of its ruling (Dist. Ct. Dkt. 223), in response to EPA's Second Motion For Reconsideration (Dist. Ct. Dkt. 218), which was based on the *en banc Oliver* decision, 686 F.2d 356 (6th Cir. 1982), which reversed the panel decision.

As depicted in Photograph 3 of the Sealed Joint Appendix[2], Dow's Midland manufacturing facility covers 4500 acres (about 2000 are inside the fence line) and includes 710 buildings and open-air structures which are connected by nearly 40 miles of roadways, where thousands of employees in 80 production plants (all within the fence line) manufacture about 500 products. It is hard to imagine a more secured and developed manufacturing complex (Pet. App. B-19-21). The degree of development is reflected in the more than $10 million in property taxes the Dow Midland manufacturing facility pays each year. This is not the "unoccupied or undeveloped" open fields referenced in *Oliver, supra* at 225, n. 10.

Photograph 1 in the Sealed Joint Appendix depicts one of the dozens of open-air plants in the secured Dow Midland facility. An "open-air" plant is a three-dimensional commercial structure which encompasses the production equipment and know-how and which does not have a traditional roof. Plants are designed as open-air production processes for reasons of worker safety, economics and industry custom (A. 59-60, 64-65, 71-72 and 74). For instance, routine maintenance in the plant shown on Photograph 1 requires cranes with 100-foot booms to move equipment weighing up to 50 tons (A. 75). A roof is not needed and would be totally impractical from an engineering standpoint (A. 74). With respect to the issues in this case, physical "protection" from mere aerial observation is unnecessary since the

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[2] Contrary to the assertion in n. 5 on p. 18 of the government's brief, Photograph 3 is a Dow photograph and *not* a photo taken for EPA. Photograph 3 is representative of what a person would "observe" unaided from the air. It, and a demonstrative enlargement found at Dist. Ct. Dkt. 172, was used to easily distinguish between "mere observation" and the intrusive, detailed EPA aerial Photographs 1 and 2.

complexity and the smallness of the detail is its own protection from the unaided aerial human eye (*cf.* Photograph 1 *versus* Photograph 3).

Private homes and outbuildings are clearly depicted on Photograph 1 (one of many EPA photographs showing non-Dow property). The homes are in the lower right-hand corner of the photograph. Moving "up" the photograph, one traverses the county road, the Dow 8-foot fence, the berm (roughly 50 yards in from the fence; part of the snow-covered berm is hard to distinguish since it parallels the afternoon sun rays and does not create a shadow), and then enters the 30-acre production plant (A. 74-76). Turning to Photograph 2, which is a 60% overlap of Photograph 1[3], the manufacturing plant is now in the lower part of the frame and Dow's West Side Power Plant (one of the targets of EPA's quest) is "above" the production plant.

Looking at the 30-acre manufacturing plant on either Photograph 1 or 2, it is easy to see how interrelated the two major buildings (the building with the tan roof in the "upper" portion of the plant, and the building housing the control room with the flat, snow-covered roof near the center of the plant) are to the other contiguous parts of the commercial structures which com-

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[3] Contrary to n. 1 on p. 3 of the government's brief, the two frames selected as representative of what EPA did and what Dow was trying to protect were frames 9505 and 9506 — not 8505 and 9506. The consecutive frames are important because it is the 60% forward overlap (A. 43) that allows stereoscopic viewing which shows depth (*e.g.*, the height of tanks) (Lake Depo. I, pp. 82-83, Dist. Ct. Dkt. 41). Such work is done with original contact prints, as Photographs 1 and 2, *not* with enlargements. Photointerpretive analysis was requested by EPA on the photos of Dow (A. 44). EPA people with experience in photographic analysis, enhancement or reconnaissance examined the photographs (A. 36). Both frames 9505 and 9506 were enlarged 10× and 20×for demonstrative purposes (*See*, Dist. Ct. Dkt. 171, under seal).

prise the production process. In fact, Photograph 4 shows that process equipment abuts the control room building, which is the snow-covered roofed structure in the upper right corner of the photograph.[4]

Photograph 4 also shows that walking through the plant is similar to walking on a city street lined by tall buildings. Contrary to the government's statement on p. 49 of its brief (substituting, of course, the phrase "detailed aerial photography" for mere "observation"), the authority expressly conferred on EPA to enter premises at ground level for specific purposes is undoubtedly *not* more intrusive than detailed aerial photography. Such surreptitious photography amounted to a nonparticularized, general, fence-to-fence search which captured much more detail of the *entire* 2000-acre secured facility than an on-site inspection ever could.

The minute details of the plant which are so important to Dow, which are not visible by aerial naked-eye observation, and which establish the constitutionally-offensive intrusion in this case, are contained on the *original* EPA contact prints — Photographs 1 and 2 in the Sealed Joint Appendix. The government, apparently forgetting that it made enlargements of the very plant in question (Dist. Ct. Dkt. 15, under seal)[5], attempts to cloud the issue

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[4] The Dow enlargements were made for demonstrative purposes such as this. Photointerpreters use the original contact prints for their work — not enlargements such as Photographs 4 or 5.

[5] EPA made three complete sets of contact prints along with 50 2 × enlargements (5 each of 10 frames) (A. 42). At page 3 of its brief the government leaves the impression that only one significant enlargement was made. A number of the enlargements of the power house made by EPA depict the *exact* manufacturing facility shown in Photographs 1 and 2 of the Sealed Joint Appendix (Dist. Ct. Dkt. 15). The government erroneously states that Dow made the only enlargements of consequence and also that Dow does not assert the existence of private information in the pictures of the power plants (*e.g.*, Gov't. Brief, pp. 28, 31 and 40 n. 27).

and persuade the Court that the offensive detail is only on the Dow enlargements (Gov't. Brief, pp. 27-28).[6] Using hand-held magnification and the original EPA contact prints, the Dow plant manager discerned items and equipment as small as ½-inch in diameter (A. 53-54). Of course, that is not surprising since a naked-eye study of those original contact prints reveals both power lines and their shadows.

NOWHERE IN ITS BRIEF DOES THE GOVERNMENT ARGUE, OR CITE ANY AUTHORITY, THAT THE DOW FACILITY IS AN OPEN FIELD. The government does discuss cases such as *Hester* v. *United States*, 265 U.S. 57 (1924) and *Oliver*, *supra*, but it never relates those cases to the facts of this case. Rather, the government gives "secured, open-air commercial structure" the extremely loose translation of "outdoor activity or plant," and equates "intrusive, detailed aerial photography" with "observation or viewing," and hopes for the best.

Dow urges the Court to think "secured, developed open-air commercial structure" and "detailed aerial photography" whenever the government uses the terms "outdoor plant or activity" and "observation."

The government does not argue that the Dow property is anything other than a secured, developed industrial facility. That fact alone takes the case out of the *Hester* "open field" ambit and places it within the purview of *Marshall* v. *Barlow's Inc.*, *supra*. The fact that the "windows" in the Dow structure open to the vertical, rather than the horizontal, perspective is of no constitutional significance. The significance is the exploitation of

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[6] Whatever detail is depicted on the enlargements is also necessarily found on the original contact prints. The government implies (p. 29) that by "manipulating" and enlarging the photos Dow somehow created new images not captured on the original EPA photos.

technological advances to intrude into a secured, developed commercial structure to reveal details about the interior of the premises that could *not* have been obtained by mere visual surveillance. *United States* v. *Karo*, 82 L.Ed.2d 530, 536, 541-2 (1984) *reh. den.* 82 L.Ed.2d 942.

The government on page 21 of its brief admits that "aerial photography allows more to be seen than mere observation from the air by the unaided human eye." Conspicuous by its absence, the government does *not* go on to argue that the photographic detail it captured of the Dow facility — detail that far exceeded the capabilities of the unaided human eye — was not intrusive surveillance into a secured, developed commercial structure.

Rather, the government ignores the facts of the case and basically argues that "observation" ought to be allowed.[7] Then, with no distinctions as to quality, purpose or authority *re* aerial photography, the government arrives at the sweeping but unsupportable conclusion that "[t]he same principles [concerning government aerial observation] apply when a photograph is taken from an airplane flying overhead" (Gov't. Brief, p. 7).

Since this is neither a "plain view" nor an "open field" nor a "mere observation" case, cases such as *Texas* v. *Brown*, 460 U.S. 730 (1983), *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), *Hester* v. *United States*, *supra*, and the many marijuana overflight/mere

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[7] The government ignores both its admission that aerial photography is more powerful/intrusive than mere observation and the fact that the EPA did not even attempt to "observe" the Dow plant. A contractor was hired to take about 100 color shots of the entire Dow facility for the express purpose of capturing the details of the operation for use as evidence and for photointerpretive work (A. 32, 39, 43, 44, 46).

observation cases cited in the government's brief do not support the government's argument. Here, the government used technology to intrude into the non-visible details of Dow's secured facility. The technology of a certified mapping camera did not merely enhance the human visual sense, as a flashlight does; it goes far beyond human capabilities and accomplishes a feat no moving, airborne human eye could do. The camera perceived and captured minute detail, the smallness of which is protection from mere human aerial observation. The surreptitious use of a technological aid to intrude into a secured commercial structure, into details not discernible by visual surveillance, violates the Fourth Amendment. *United States* v. *Karo, supra* at 541.

A search occurs when there is an unreasonable governmental intrusion upon a reasonable expectation of privacy; a seizure occurs when there is a meaningful interference with a possessory interest in property. *United States* v. *Jacobsen*, 466 U.S. 109, 80 L.Ed.2d 85, 94 (1984). The laws protecting trade secrets and *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), were cited by Dow in its Brief on the Merits to buttress the already-strong argument that Dow's expectation of privacy in the non-public details of its secured commercial structures was an expectation that society deems reasonable. The government's argument beginning on page 37 of its brief concerning the capturing of trade secrets on the photographs misses the point. It is the intrusive surveillance of detail (trade secret or otherwise) beyond the purview of the naked eye that constitutes the Fourth Amendment violation. The Fourth Amendment violation exists independently of the capturing of any Dow trade secrets.

Dow's motive in this case is to protect its trade secrets (assets) and commercial competitiveness. Dow's interest is to preserve its right to privacy and right to be free

from unreasonable government search in the form of intrusive aerial photography.

II.

EPA'S AERIAL PHOTOGRAPHY PROMOTES NO LEGITIMATE GOVERNMENTAL INTEREST.

"[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). There are no legitimate governmental interests to balance against the severe intrusion upon Dow's privacy in this case. In addition, aerial photography is not a "law enforcement practice." The EPA's action was entirely unchecked and without reasonable safeguards.

As stated in its Brief on the Merits, Dow believes that aerial photography as a site inspection technique is totally outside of EPA's statutory inspection authority. 42 U.S.C. § 7414.

EPA promoted no legitimate governmental interest in this case. The photographs showed no smoke coming from the powerhouses (A. 31), and thus they were worthless as evidence in the enforcement action. The aerial photography was a wholly ineffective technique that lent no assistance to any legitimate governmental function.

When the nature and quality of the intrusion on Dow's Fourth Amendment rights are balanced against the government's actions in this case, EPA's conduct is clearly unreasonable. *Cf., United States* v. *Jacobsen, supra* at 101. There are no governmental interests, much less important ones, proffered to justify the intrusion. In

fact, long before the overflight the government had all the evidence against Dow that it needed (A. 27-28).

The nature and quality of the intrusion clearly establish constitutionally offensive scrutiny. The magnitude of the surreptitious, continuing intrusion is shocking. The agency did not take one brief look at specific structures in the Dow facility in which they arguably have an interest. The agency conducted an exploratory search of the entire 2000-acre Dow facility, permanently capturing in vivid detail Dow personal property not otherwise exposed to view.

EPA had a number of alternatives to aerial photography. For instance, under section 114(a)(1) of the Clean Air Act the Administrator may *require* any site owner to maintain records, make reports and provide such other information as required. 42 U.S.C. § 7414 (a)(1). As the record reflects, Dow had provided all the schematics and diagrams of the powerhouses that EPA requested prior to the time of the overflight (A. 25, 28). EPA had requested no further information from Dow.

The giving of information to the EPA (as opposed to surreptitious taking by EPA) allows the owner to claim trade secret protection according to 42 U.S.C. § 7414(c) and 40 C.F.R. 2.201, *et seq*. Otherwise, as in the case of aerial photographs and photointerpretive reports, unmarked documents are considered to be in the public domain and available under the Freedom of Information Act (5 U.S.C. § 552) to the extent the requestor is willing to pay for reproduction (Trakowski Depo., pp. 26-30, Dist. Ct. Dkt. 42).

In its nonchalant discussion of its possession of the intimate details of Dow's raison d'être, the government (Gov't. Brief, pp. 9, 40) attempts to lessen the actual intrusion upon Dow's rights and privacy. However, in

the two months after the flyover and before the film and photos were placed under seal, the EPA shipped the film and photos to and from their photographic labs in Las Vegas via airline baggage/air freignt (A. 41; Beyer Depo., p. 79, Dist. Ct. Dkt. 30). Once the film and enlargements were back in Chicago, the enlargements were kept on heating ducts, on the floor and hung on office walls, which offices had no doors (A. 52-53; Rothblatt Depo., pp. 36-37, Dist. Ct. Dkt. 33). The pictures were seen by other than "need to know" persons (Rothblatt Depo., pp. 54-55, Dist. Ct. Dkt. 33; Beyer Depo., pp. 79-83, Dist. Ct. Dkt. 30).

All of the film, prints and enlargements were to be placed into the custody of the District Court and under seal per a stipulated order entered April 7, 1978 (A. 3; Dist. Ct. Dkt. 15). Despite that order, EPA "found" an "extra" roll of prints in its possession in July, 1978 (Lake Depo., p. 100, Dist. Ct. Dkt. 41). Contrary to the government's position (pp. 9, 40), EPA's actions with respect to Dow's personal property do cause Dow great concern.

Although the government asserts (p. 45) that aerial photography "materially assists" EPA in "the exercise of important governmental functions," the government never offers an explanation of how it materially assists or what important government functions it references. On the bottom line it boils down to the fact that the government had no need (or authority) for its actions and it has nothing but empty rhetoric in defense of its unauthorized, intrusive conduct.

III.

THE GOVERNMENT'S ARGUMENTS DO NOT CORRESPOND TO THE FACTS.

In addition to confusing mere observation and detailed aerial photography, the government attempts to put aerial photography rather than its own conduct under scrutiny (Gov't. Brief, p. 32). This is not a case against aerial photography any more than a wiretap case is against the equipment employed, or a murder case is against the gun or other weapon, or other surveillance cases are against telescopes or beepers. *E.g., United States* v. *Karo,* 82 L.Ed.2d 530 (1984); *Katz* v. *United States,* 389 U.S. 347 (1967); *Berger* v. *New York,* 388 U.S. 41 (1967); *United States* v. *Kim,* 415 F.Supp. 1252 (D. Ha. 1976); *United States* v. *Lace,* 669 F.2d 46 (2nd Cir. 1982), *cert. den.* 459 U.S. 854; *United States* v. *Taborda,* 635 F.2d 131 (2nd Cir. 1980). It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence. *United States* v. *Karo, supra,* at 539-540.

In its argument the government refuses to acknowledge that all aerial photographs are not alike. The variables are numerous, including perspective (vertical or oblique), resolution, weather conditions, camera and quality. In conjunction with its security measures against unauthorized aerial photography (A. 13-22), Dow does release photographs of the production facility *after* internal review (A. 20). Although Dow tries to get a credit line (*e.g.,* Photo Courtesy of The Dow Chemical Company) (A. 13), sometimes it appears (Federal Prying From The Sky, *NATION'S BUSINESS,* October 1985, pp. 34, 36), and sometimes it does not (The EPA's Eye In The Sky Has Companies Seeing Red, *BUSINESS WEEK,* October 28, 1985, p. 90). In any event, those photographs released by the company are taken at an oblique

angle and have passed internal muster. They are obviously and easily distinguishable from the EPA photographs (*cf.*, Photographs 1 and 2, Sealed Joint Appendix).

In its brief the government places importance on the fact that the detailed aerial photographs were taken from public airspace. So what? The question is whether the surveillance intruded into Dow's reasonable expectation of privacy. *Katz* v. *United States, supra.* It did. The photographs captured and depicted more detail and information than the unaided aerial human eye and mind could ever hope to do (Pet. App. B-27; Gov't. Brief, p. 21). It is inconceivable that the government can intrude so far into a developed commercial structure that it can detect items and equipment as small as ½-inch in diameter and still not be considered to have engaged in an unreasonable search. *Cf., United States* v. *Kim, supra,* at 1256; *United States* v. *Lace, supra;* and *United States* v. *Taborda, supra.*

The fact that the photos were taken from lawful altitude is of no moment.[8] FAA regulations were designed to promote air safety, not to define reasonable expectations of privacy. *See, State* v. *Davis,* 627 P.2d 492, 494 (Or. App. 1981).

In its attempts to make aerial photography seem ordinary and mundane, the government: fails to recognize that all aerial photographs are not of like quality and

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[8] The minimum altitude over a congested area is not 1000 feet, as the government states at p. 19. Rather, it is 1000 feet above the highest obstacle within a horizontal radius of 2000 feet of the aircraft. 14 C.F.R. § 91.79. Although there is no "nearby tall building or water tower" with reference to the Dow facility as speculated in n. 4 on p. 17 of the government's brief, there are structures within the Dow facility that are over 200 feet high.

resolution[9]; fails to admit that the EPA photographic labs are set up for vertical aerial mapping cameras and printers (A. 51), not the hypothetical hand-held camera; fails to acknowledge that the Michigan Department of Natural Resources photograph (referenced at Gov't. Brief, p. 23 and at A. 54 and filed as a part of the record by EPA — Dist. Ct. Dkt. 167) bears absolutely *no* resemblance to the intrusive detail contained in the EPA photographs of the Dow plant; and finally, fails to acknowledge that *the only photographs taken of Dow's Midland facility at the request of EPA are the subject of this lawsuit* (A. 33), and that the agency's own enforcement personnel thought the photos were novel (Beyer Depo., p. 81, Dist. Ct. Dkt. 30; Rothblatt Depo., pp. 54-55, Dist. Ct. Dkt. 33).

The EPA aerial photographs of Dow's facility are not ordinary or mundane. To the best of Dow's knowledge, they are intrusively unique.

IV.

AERIAL PHOTOGRAPHY FAR EXCEEDS THE SCOPE OF EPA'S STATUTORY AUTHORITY.

The government's position on this issue is accurately and succinctly stated in its Summary of Argument (p. 10): the EPA assumed it could use the investigation technique and then assumed the power.[10] As noted on pages 42-49

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[9] Although aerial photography may be "common" in the sense that it can be acquired for a price, the government certainly slights the capabilities of aerial photography and the training of aerial photographers when it equates aerial photography and mere visual observation in its brief, pp. 17-21. *See generally*, MANUAL OF COLOR AERIAL PHOTOGRAPHY, American Society of Photogrammetry (1968).

[10] At one point EPA also "assumed" it could utilize the military to aid in civilian law enforcement (about 50-60 times over 9 years) — clearly in violation of the *Posse Comitatus Act*, 18 U.S.C. § 1385. (Dybdahl Depo., pp. 62, 87-88, Dist. Ct. Dkt. 49).

of Dow's Brief on the Merits, that assumption of power is without statutory authority, is contrary to the plain language of section 114(a)(2) of the Clean Air Act (42 U.S.C. § 7414(a)(2)), and is inconsistent with both section 114(c) of the Act and existing tort and criminal laws protecting trade secrets. Neither the Court of Appeals' decision nor the government cites any authority to the contrary.

On page 10 of its brief the government blithely asserts that "the agency is entitled to use any methods of investigation that could lawfully be employed by private investigators." The government then ignores the fact that if private individuals procured aerial photographs such as EPA's Photographs 1 and 2 in the Sealed Joint Appendix, Dow would press charges in both the criminal and civil courts. Michigan Compiled Laws sections 752.772, 750.539a and d (Pet. App. E); Restatement of Torts section 757 (1939) (Pet. App. C); *Kewanee Oil Company* v. *Bicron Corporation*, 416 U.S. 470, 475-476 (1974); and *DuPont* v. *Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. den.* 400 U.S. 1024 (1971).

The government's citation (p. 46) to what federal *law enforcement* agencies may do in support of what this *administrative* agency can do is especially distressing. That argument confuses the basic differences in purpose and function among the agencies, ignores the explicit, different terms of statutory authority granted to each agency, and amounts to the repugnant bottom line that "the government is the government and as long as any agency has the power, all agencies have the power." Apparently some in the federal government forget that it is a government of limited powers.

The government states (p. 48) that the Clean Air Act, first enacted in 1970, somehow "expanded" the government authority to investigate air pollution. The actual

statement made does not support the government's argument. The type of statement cited by the government, remarks made during Senate Committee hearings, are generally not used as statutory construction aids — especially when there is plain meaning in the language employed by Congress. *Federal Trade Commission* v. *Raladam*, 283 U.S. 643, 650 (1931).

Under the government's interpretation, section 114(a)(2) "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search," the very situation in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 323 (1978) (OSHA inspection) which violated the Fourth Amendment.

Unlike OSHA, which after public notice and comment adopted regulations concerning site inspections (29 C.F.R. § 1903, *et seq.*), EPA has no regulations governing inspections or its inspectors. EPA has assumed powers not reasonably within the plain meaning of Congressional language, and has gone about its self-perceived business without public or judicial oversight. EPA has combined unbridled discretion with an extremely intrusive inspection technique.

The government states (n. 32, p. 50), that EPA specifically addressed the issue of overflights in a May 1978 *internal* policy (no public notice and comment). Contrary to the implication in the footnote, the notification of companies after an overflight (not applicable to this case) was not an agency policy. It was merely a Region V program (C.A. App. 160). As documented at pages 86-93 of the Joint Appendix, Regions II and VII attempted prior notification, which evoked the same corporate concern for Fourth Amendment rights and trade secrets that Dow asserts here.

CONCLUSION

For the foregoing reasons, as well as those stated in Dow's Brief on the Merits, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

By: /s/ JANE M. GOOTEE, Esq.
Counsel of Record

JAMES H. HANES, Esq.
BERND W. SANDT, Esq.
THE DOW CHEMICAL COMPANY
1111 Washington Street
Midland, Michigan 48674
(517) 636-2663

Counsel for Petitioner

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